See Vol. 3076

No. 16,053

United States Court of Appeals

For the Ninth Circuit

JEAN DOBLER,
Appellant,

vs.

OLETA STORY,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable O. D. Hamlin, Judge.

APPELLANT'S REPLY BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Codes

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APPELLEE HAS GIVEN NO LAWFUL EXCUSE FOR HER NON-COMPLIANCE WITH THE PROVISIONS OF THE CALIFORNIA CIVIL CODE RELATING TO RESCISSION.

As pointed out in appellant's opening brief (App. Op. Br., pp. 13-14), California Civil Code §1691 (erroneously referred to as C.C.P. §1691, App.Op.Br., p. 13) states the manner in which a contract may be avoided if there is mistake present. Of course, the first requirement is notice. This requirement does not place an onerous burden on the person seeking rescission. It does not require any financial outlay on the part of the person giving it. Yet, even this simple step was not taken by appellee. Nowhere in appellee's reply brief does she offer any excuse or any

theory which would excuse or relieve her from this basic requirement of rescission.

Appellee attempts to rationalize in her reply brief that she did not have to make a tender of the consideration received, as required by California Civil Code §1691, in order to rescind the contract because appellant would not have accepted it. This, of course, is sheer speculation and guessing on appellee's part. There is nothing upon which she can logically base this gross assumption, except perhaps her imagination.

Appellee cites the case of *Carruth v. Fritch* (1950), 36 C.2d 426, 224 P.2d 702 in support of her proposition that no tender of consideration was needed. A reading of that case will reveal that the factual situation was entirely different. The trial court had sustained a demurrer with leave to amend but plaintiff failed to amend and the suit was dismissed. The judgment of dismissal was appealed. The plaintiff alleged that there was fraud by the defendants securing the release; that defendants knew the consideration which was paid for the release would immediately be used for medical expenses; that defendants were seeking to place her in a position where she could not tender the money advanced in the course of their fraud and relied on such facts and their fraud to prevent plaintiff from rescinding. There is no parallel between the *Carruth* case and the case at bar. Even in view of the strong allegations of fraud, there was a strong dissent in the case by Justices Schauer, Shenk and Spence urging that the judgment of dis-

missal be affirmed on the basis that it was incumbent upon plaintiff to restore the consideration she received for the contract before she could avoid it.

In the case of *Jordan v. Guerra* (1943), 23 C.2d 469, 476 cited by appellee (Appellee's Rep. Br. p. 18), there was strong evidence of fraud. In that case the court held that in view of the fraud and overreaching on the part of the defendant, there was no need for restoration of the consideration. It is to be noted that even though there was no restoration of the consideration in the *Jordan* case, there was a notice of rescission.

Again in *Meyer v. Haas* (1899), 126 C. 560, 563 cited by appellee (Appellee's Rep. Br. p. 18), there was fraud and deceit on the part of the party attempting to enforce the release. The court stated that the plaintiff had been tricked into signing a contract different in its terms than the one he had made. This, of course, is in no way analogous to the case now under consideration. There has been no claim of any fraud, trick or deceit on the part of appellant causing appellee to sign the release.

In *Wetzstein v. Thomasson* (1939), 34 C.A.2d 554 (Appellee's Rep. Br. p. 18), the person seeking to avoid the release was unable to read or write English, and so, of course, could not read the document he signed. There was also fraud and misrepresentation involved. Once again, there was notice of rescission given by the party seeking to avoid the release. The court said in *Gajanich v. Gregory* (1931), 116 C.A. 622 (Appellee's Rep. Br. p. 18) that in that particular

case there was no need for restoration since the plaintiff had never received anything of value.

In all of the cases cited by appellee for the proposition that there need not be a tender of the consideration received in order to rescind a release, there was fraud and overreaching on the part of the party attempting to enforce the release, or an agent of said party.

None of the cases cited by appellee is authority for appellee's contention that "a tender of the consideration was not essential." The requirements of the California Civil Code regarding rescission were mandatory if appellee wished to rescind the contract (California Civil Code §1566).

APPELLEE WAS BOUND BY THE RELEASE WHICH SHE SIGNED, WHETHER SHE READ IT OR NOT.

Appellee claims that she can be relieved of the effects of the contract because she was mistaken as to its meaning. As pointed out in appellant's opening brief, one who is negligent in not informing himself of the contents of a written contract, signs and accepts the agreement with full opportunity of knowing the true facts, cannot, in the absence of fraud or misrepresentation, avoid liability on the ground that he was mistaken concerning the terms (App. Op. Br. p. 11 and cases cited therein).

Appellee now asserts that because of either fraud, confidential relationship or excusable mistake, she is

not bound by what she signed. In support of this theory she cites three cases on page 10 of her reply brief. An examination of these cases shows that each one is concerned with a situation in which the person seeking to uphold the release was active in securing its execution by means of some sort of fraud or misrepresentation. Of course, in the present case there was no contact between appellee and appellant concerning the release (R.T. p. 35). The record is absolutely devoid of any showing on appellee's part of fraud, misrepresentation, confidential relationship or excusable mistake which would bring her under an exception to the above mentioned general rule. Appellee received the release in the mail from *her own* insurance broker with a note asking her to sign it before a notary (R.T. p. 37). This cannot be called a confidential relationship.

The only explanation of appellee's failure to read the contract of release and her resulting claim of misunderstanding its contents, is that she was careless and negligent. It is the well established rule that where failure to familiarize one's self with the terms of a written contract is traceable solely to carelessness or negligence, neither courts of law nor courts of equity will relieve one from the effects of one's folly. *Roller v. California Pacific Title Ins. Co.* (1949), 92 C.A.2d 149, 154, 206 P.2d 694.

Appellee nowhere gives any reason or excuse for not reading the release.

None of the authorities cited by appellee support her position that she may be relieved from the effect

of the release just because she did not read it. All of the cases cited by appellee involve fraud or a person who was unable to read the contract because of inability to read English or impaired physical condition. This is not the situation in the case at bar. Appellee has no such excuse to justify her own negligence in not reading the document.

CONCLUSION.

For the reasons stated herein and in appellant's opening brief, it is respectfully submitted that the judgment of the trial court below should be reversed, and the cause remanded with a direction to the trial court to enter judgment for the defendant Jean Dobler.

Dated, San Jose, California,
March 10, 1959.

Respectfully submitted,

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Attorneys for Appellant.